IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GREGORY LEE, SR	**APPELLANT**
VERSUS	**CASE NO.2007-CA-02088**
SONIA LEE	**APPELLEE**

APPEAL FROM

THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

Sonia Lee, Appellee

Stephanie L. Mallette, Attorney for Appellee

Monique Brooks Montgomery, Attorney for Appellant (Trial Counsel)

Gregory Lee, Sr., Appellant

Honorable Kenneth M. Burns, Chancellor

STEPHANIE L. MALLETTE
Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

1, 2004, in child support which represented twenty percent of his adjusted gross income. (R.E.10). Coincidentally, twenty percent of adjusted gross income is the statutory amount for two children. M.C.A. § 43-19-101(1). The parties also agreed that Sonia Lee should have physical custody of the minor children and Greg Lee, Sr. having reasonable visitation as set forth in the agreement. (R.E. 8). In Section 11, Greg Lee, Sr. agreed to provide insurance coverage as well as to pay one half of all expenses not covered by that insurance for both children. (R.E.10). In Section 12, the Appellant agreed to keep and maintain a college fund for M.T.L. as he already had a college fund for the son of the parties. (R.E. 12).

The Honorable Kenneth Burns, Chancellor, entered a Final Decree of Divorce on June 22, 2005. (R.E. 16-18). The Court incorporated the terms and conditions of the Child Custody and Settlement agreement into the Final Decree of Divorce by reference. (R.E. 17). On April 27, 2006, Chancellor Burns entered an Order for Withholding which compelled Greg Lee's employer to withhold $714.40 per month as well as $75.00 per month to go toward the arrearage Mr. Lee had accumulated due to his failure to pay child support. (R.E. 19). On June 26, 2007, Greg Lee, Sr. caused to have filed on his behalf what is entitled a "Petition to Modify Former Decree."[1] (R.E. 22-24).

Sonia Lee was served with a copy of the Petition to Modify Former Decree, and her attorney entered an appearance on August 3, 2007. (R.E. 25). On August 15, 2007, the Appellee filed a Motion for DNA Testing as well as a Motion for Appointment of a Guardian *Ad Litem*. (R.E. 26, 29). On August 17, 2007, the Appellant filed a Partial Objection to Respondent's Motion for DNA

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[4] The pleading is not dated by the attorney for the Appellant, so only the date of filing is known.

[5] Although signed by Judge Burns on August 17, 2007, the order was not stamped "Filed" until August 31, 2007.

DNA Testing requesting that the Court order DNA testing be done through the Department of Human Services. (R.E. 41).

On August 27, 2007, Sonia Lee filed an Objection to Petitioner's Motion disputing Greg Lee, Sr.'s allegation that she was questioning the validity of the April 2004 DNA test. (R.E. 44). At all times, Sonia Lee has maintained that she is not disputing the validity of the April 2004 DNA test but rather its admissibility. (R.E. 44-45). As a result, Sonia Lee filed a Motion to Withdraw Respondent's Motion for DNA Testing on August 27, 2007. (R.E. 46). Likewise, she filed a Motion to Withdraw Respondent's Motion for Guardian *Ad Litem* on August 27, 2007. (R.E. 49). On August 30, 2007, Chancellor Burns entered an Order that DNA testing be done by the Department of Human Services through Reliagene, and that the expense of the test was to be paid by Greg Lee, Sr. with the understanding that the Court would ultimately determine how much each party would owe. (R.E. 51-52). Judge Burns' Order makes it clear that the testing was to be done at the request of the Petitioner. (R.E. 51). On August 27, 2007, the Chancellor entered at Sonia Lee's request an Order Allowing Withdrawal of Respondent's Motion for DNA Testing (R.E. 53), and an Order Allowing Withdrawal of Respondent's Motion for Guardian *Ad Litem*. (R.E. 54).

The parties and their attorneys appeared before Chancellor Burns on September 25, 2007; and the attorneys entered into a stipulation of facts in lieu of testimony as is evidenced by both attorneys' signatures being affixed to the factual stipulations.[6] (R.E. 55). The Chancellor entered his Opinion and Judgment on October 23, 2007. (R.E. 62). He dismissed Greg's Petition and ordered Sonia to pay for one half of the genetic testing. (R.E. 65-6). Mr. Lee filed a Motion for Reconsideration of Opinion and New Trial on November 5, 2007. (R.E. 67). On November 6, 2007,

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[6] The transcript of the proceedings held in Lowndes County Chancery Court on September 25, 2007, may be found in Record Excerpt 56.

Greg Lee, Sr. filed an Amended Motion for Reconsideration of Opinion and New Trial. (R.E. 75). On November 9, 2007, the Chancellor signed an Order Overruling Amended Motion for Reconsideration of Opinion and New Trial. (R.E. 83). Aggrieved, Mr. Lee filed a Notice of Appeal on November 21, 2007.

II. Argument

I. DID THE CHANCELLOR COMMIT REVERSIBLE ERROR BY (A) FAILING TO FIND FROM THE FACTS PRESENTED THAT A MATERIAL CHANGE OF CIRCUMSTANCE HAD OCCURRED THAT JUSTIFIED MODIFICATION OF THE FINAL DIVORCE DECREE OR (B) FAILING TO MODIFY THE FINAL DIVORCE DECREE BASED ON THE FACTS PRESENTED PURSUANT TO MISSISSIPPI RULE OF CIVIL PROCEDURE 60(b)?

From the beginning, this case has suffered from a horrible identity crisis. The proceedings at bar began with Greg Lee, Sr. filing a Petition to Modify Former Decree. (R.E. 22). However, at no time has the Appellant offered any credible evidence nor argument that there has been a material change in circumstances justifying a modification of child support. In *Tedford v. Dempsey*, 437 So.2d 410, 417 (Miss. 1983) (discussed in more detail below), stated that a substantial or material change in circumstances of one of the interested parties must exist to justify modifying a child support decree. Likewise, no allegation whatsoever is made in the initial pleading that the Appellant is proceeding under Mississippi Rule of Civil Procedure (M.R.C.P.) 60(b). So if the pleading is to be read literally on its face, the Appellant sought to have the Final Decree of Divorce modified to relieve Mr. Lee of his obligation to support his daughter, M.T.L. As a result, Chancellor Burns properly denied the Petition for the Appellant's absolute failure to prove a material change in circumstances. (R.E. 64). To put it quite plainly, Greg Lee, Sr. knew he was not the biological father of M.T.L. when he entered into a contract with Sonia Lee (and vicariously M.T.L.) to support M.T.L. as if he was her biological father.

Further, the Chancellor extended the benefit of the doubt to Mr. Lee and considered the

matter under Rule 60(b) likewise determining that Mr. Lee had failed to prove that any of the actionable occurrences in Rule 60(b) were present in this case. The only fraud present in this case involves Mr. Lee's repeated assertions that he did not know on April 14, 2005, when he agreed to support M.T.L. he was not her biological father. Mr. Lee comes before this Honorable Court almost two years subsequent to the entry of the Final Decree of Divorce. He has repeatedly attached to almost every pleading the results of the April 7, 2004, DNA test he conducted which was done before the parties even separated. Mr. Lee stipulated through counsel that the original DNA test results were created one year and seven days prior to the parties signing the Child Custody and Settlement Agreement. (R.E. 55). He further stipulated that he gave a copy of that DNA report to Sonia Lee prior to their signing the Child Custody and Settlement Agreement. (R.E. 55). Yet, Greg argues that he did not know he was not M.T.L.'s biological father when he obligated himself to pay child support.

In reviewing rulings of M.R.C.P. 60(b) Motions, the Mississippi Supreme Court has stated that they are generally in the sound discretion of the trial court and appellate review is limited to whether discretion has been abused. *Stringfellow v. Stringfellow*, 451 So.2d 219, 221 (Miss. 1984), citing *Clarke v. Burkle,* 570 F.2d 824 (8th Cir. 1978).

The Appellant goes to great lengths to contort the record so as to indicate to this Court that the Appellee disputed the validity of the 2004 DNA test. However, Mr. Lee has repeatedly left out two very important facts when making this argument at both the trial and appellate levels. First and foremost, Sonia Lee states without equivocation in her Motion for DNA Testing that she is not disputing the validity of the 2004 DNA test but rather questioning the admissibility of the evidence to prove the parentage of M.T.L. (R.E. 44). The 2004 DNA test was admissible for the purpose of showing that Mr. Lee had knowledge (that he knew or should have known) that she was not his

biological child at the time he contracted to pay child support; however, it was not admissible to prove the truth of the matter asserted by Mr. Lee which was that M.T.L. is not his biological child. As this court is well aware, validity and admissibility are two entirely different matters. Second, Mr. Lee has chosen to overlook the fact that Sonia Lee withdrew her Motion for DNA Testing. (R.E. 47). The trial court entered an order allowing her to do so. (R.E. 53). As a result, it is absolutely improper for the Appellant to now try to use that Motion against the Appellee in any way as it was properly withdrawn and was not considered by the trial court. (R.E. 53).

Mr. Lee alleges in his brief that, "In our case, Greg never adopted M.T.L., nor had he contracted to support her knowing that she was NOT his child. In the Child Custody and Settlement Agreement, both parties agreed that M.T.L. was their child. That is what Greg believed at that time." Appellant's Brief, Page 8. Further, in the original Petition to Modify Former Decree, Greg alleges in Paragraph IV, "That subsequent to the Decree, a paternity test was performed upon request of the Petitioner in which it was revealed that there was a zero percent chance that the Petitioner herein was the father of the minor child, M.T.L. and he was excluded as the biological father." (R.E. 22-23). Mr. Lee then has the audacity to attach to his original petition a copy of the April 2004 DNA test showing he is not the biological father of M.T.L. all the while making the argument that he did not know. (R.E. 4).

The Decree was entered on June 22, 2005. (R.E. 16). The DNA results were created on April 7, 2004. (R.E. 4). Mr. Lee stipulated that he gave a copy of those results to Sonia Lee before April 14, 2005, so he cannot argue that he had the results generated and never looked at them. (R.E. 55). The Appellee is truly puzzled how Mr. Lee can repeatedly make the argument that he did not find out that he was not the biological father of M.T.L. until after the Final Decree of Divorce was entered. Unless he lives in a parallel universe, April 7, 2004, happened before April 14, 2005.

This case is about the duties and obligations of a legal father as compared to a natural father. Mr. Lee states repeatedly that Sonia Lee had an adulterous affair which led to the conception of M.T.L. While he may be correct, it is a moot point; and it is also beyond the facts agreed to by the parties. Only those facts contained in the trial court's order concerning the stipulation of facts are properly before this court. The Final Decree of Divorce rendered the fact that Sonia may have had an adulterous affair while married to Greg Lee, Sr. as resolved. (R.E.16-18). For Greg to now argue that he was oblivious about M.T.L. not being his biological child at the time he swore to the Child Custody and Property Settlement Agreement is preposterous. Every time he attaches the 2004 DNA report to a pleading, he proves that he knew he was not M.T.L.'s biological father.

Something made Mr. Lee decide to perform a DNA test in the early part of 2004. Logically, a father only performs a DNA test on his daughter if he suspects he might not be the father. So he knew or suspected when the DNA test was done that he might not be M.T.L.'s biological father. Further, Mr. Lee points to no other event regarding the parentage of M.T.L. other than the April 2004, DNA test as his basis for the Petition to Modify Former Decree. There was no DNA test performed after the parties were divorced but prior to the filing of the Petition to Modify Former Decree despite his protestations to the contrary. The DNA test results he attached to his own Petition prove that fact. (R.E. 4).

The applicable law supports the ruling of the trial court. Concerning the Child Custody and Property Settlement Agreement, this Court ruled in *Ivison v. Ivison* that "[a] divorce agreement is 'no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character.'" *Ivison v. Ivison*, 762 So.2d 329, 334 (¶14)(Miss. 2000)(quoting *East v. East*, 493 So.2d927, 931-932 (Miss. 1986)). This Court stated as well in *Ivison*, "[W]hen parties in a divorce proceeding have reached an agreement

that a chancery court has approved, we will enforce it, absent fraud or overreaching, and we take a dim view of efforts to modify it just as we do when persons seek relief from improvident contracts." *Ivison*, 762 So.2d at 334 (¶14). This Court was quite clear in Tedford v. Dempsey when stating:

> "[T]here may be no modification in a child support decree absent a substantial or material change in the circumstances of one or more of the interested parties: the father, the mother, and the child or children, arising subsequent to the entry of the decree sought to be modified. This rule is little more than a family law variant of the familiar doctrine of *res judicata*."

Tedford v. Dempsey, 437 So.2d 410, 417 (Miss. 1983).

In *Stringfellow v. Stringfellow*, this Court announced the test to determine whether facts rise to the level of fraud under M.R.C.P. 60(b). *Stringfellow v. Stringfellow*, 451 So.2d 219 (Miss. 1984). The Court wrote, "That test is whether the allegations in the motion and indicated evidence is such that would constitute fraud which induced the agreed judgment." *Id.* at 221. This Court issued a nine-part test to determine whether there is fraud under M.R.C.P. 60(b):

> "To constitute fraud there must be (1) a representation, (2) its falsity, (3) its materiality, (4) speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury."

Id. At 221. The Chancellor was correct in denying Mr. Lee's petition as he neither pled nor proved any of the nine factors much less all nine. The Court of Appeals announced in *Tirouda v. State*, "[W]e recognize that the trial court is best able to determine whether a fraud has been perpetrated upon it. As a result, the chancellor's determination of the issue is entitled to great weight. We must also consider the specific facts in each case." *Tirouda v. State*, 919 So.2d 211, 216 (Miss. 2005).

The Appellant asserts that *M.A.S. v. Mississippi Department of Human Services* is

dispositive. *M.A.S. v. Mississippi Department of Human Services*, 842 So.2d 527 (Miss. 2003). The key difference between the case at bar and *M.A.S.* is that the father in that case did not know he was not the biological father of the child when he agreed to pay child support when a paternity order was issued. The appellant in that case signed an agreed paternity order when he was seventeen based on erroneous assertions made by the child's mother. Also, *M.A.S.* is a paternity case while the case at bar is a modification of an agreed child support order or Rule 60(b) Motion. The Appellant correctly cites *M.A.S.* as standing for the proposition that protecting a child's best interest is a goal which is the most important consideration. The Appellant interprets that to mean that the child's best interests are protected by finding out who her biological father is. However, clearly, the child's best interests can be protected by maintaining the status quo. Mr. Lee entered into a contract. Should he be allowed to back out of his voluntarily-assumed obligation, only the child will suffer. As it stands now, Mr. Lee is making child support payments for his legal child. Mr. Lee has a relationship with M.T.L. He even took her on a cruise in May of 2007, with her brother. The child is completely innocent in this consideration. There is no equitable basis to shatter her expectations of who her father is so that Mr. Lee can be released from his sworn, contractual obligation.

The Mississippi Supreme Court held in *Griffith v. Pell* citing *Logan v. Logan* that:

> "Merely because another man was determined to be the minor child's biological father does not automatically negate the father-daughter relationship held by Robert and the minor child. . .We reiterated our recognition of the doctrine of *in loco parentis*."

Griffith v. Pell, 881 So.2d 184, 185-186 (Miss. 2004) citing *Logan v. Logan*, 730 So.2d 1124, 1126 (Miss. 1998). In a footnote in the same case, the Court defines *in loco parentis* stating, "A person acting *in loco parentis* is one who has assumed the status and obligations of a parent without a

formal adoption." *Id.* at 185. The Court further held:

> "Under *Logan,* because Robert supported and cared for the minor child as if she were his own natural child, under state law, he may be required to pay child support for the minor child."

Id. at 186.

The Court heard facts similar to the facts in the case at bar in *J.P.M. v. T.D.M. J.P.M. v. T.D.M.*, 932 So.2d 760 (Miss. 2006). The Court held:

> "In the instant case, Tom was established as Catherine Morgan's legal father at the time of her birth (as his name appears on her birth certificate) and has supported her under that assumption without challenge for several years. Because Tom is Catherine's legal father, he has legal rights and obligations which cannot be compromised without sufficient cause. . .Furthermore, we note that there is no putative father in this case seeking to be recognized as Catherine's father."

Id. at 769-770. As the Court held, Tom had obligations as the legal father. In this case, Mr. Lee has obligations as M.T.L.'s legal father. Mr. Lee cannot be relieved of his agreed obligations without sufficient cause. No sufficient cause has been alleged nor proved as nothing has changed between April of 2005, April of 2004, and today.

The case which establishes Mr. Lee's duty and obligation to continue paying child support as well as exercise visitation is *Williams v. Williams. Williams v. Williams,* 843 So.2d 720 (Miss. 2003). Ironically, in that case, the Court held that a divorced husband who filed a motion to modify the divorce decree to reflect that he was not the biological father of a son born during the marriage did not have to continue to pay child support after he effectively rebutted the presumption of paternity. The father did not know at the time of the decree that he was not the biological father,

though, which distinguishes the case factually from the case at bar. However, the Court did hold that:

> "We do not hold that a man who is not a child's biological father can be absolved of his support obligations in all cases. Those who have adopted the child or voluntarily or knowingly assumed the obligation of support will be required to do so. See NPA, 380 S.E.2d 181."

Williams at 723. That is exactly the situation in this case. Mr. Lee has **voluntarily and knowingly assumed the obligation of support**, and he is required by law to continue supporting his daughter by the payment of the agreed upon child support amount. The only thing which has changed since the divorce decree is Mr. Lee's willingness to make child support payments for his legal child who is not his biological child. Despite the Appellant's best attempts to try to make something true by saying it enough times, there is no dispute whatsoever that Mr. Lee knew at the time he swore to make those child support payments that M.T.L. was not his biological daughter. As a result, his signature and swearing under oath that he would support M.T.L. after he had a DNA test proving he was not his daughter's biological father proves beyond any doubt that he voluntarily and knowingly assumed the obligation of support and should be required to continue to make those payments in accordance with the Child Custody and Property Settlement Agreement. (R.E. 13, 15).

CONCLUSION

The Appellee, Sonia Lee, submits to this Court that the Chancery Court of Lowndes County did not err in failing to grant the Appellant's Motion to Modify Final Decree. The Chancellor did not err in finding no material change of circumstance had occurred nor in finding that the Appellant was not entitled to relief under Mississippi Rule of Civil Procedure 60(b). Therefore, this Court should deny all relief sought by the Appellant and affirm the Judgment of the Chancery Court.

This the 11th day of July, 2008.

RESPECTFULLY SUBMITTED,

SONIA LEE

BY:

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CERTIFICATE OF SERVICE

I, Stephanie L. Mallette, attorney for the Appellee, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief to the following:

Monique Brooks Montgomery
Counsel for Appellant
P.O. Box 8550
Columbus, MS 39703

Honorable Kenneth M. Burns
Chancery Court Judge
P.O. Drawer 110
Okolona, MS 38860-0110

This the 11th day of July, 2008.

STEPHANIE L. MALLETTE

CERTIFICATE OF MAILING

I, Stephanie L. Mallette, attorney for the Appellee, do hereby certify in accordance with M.R.A.P. 25 (a), that I am this day depositing in the United States Mail, first class, postage-prepaid, one original and three copies of the Brief and Record Excerpts in the matter *Gregory Lee, Sr. (Appellant) v. Sonia Lee(Appellee)*, case number 2007-CA-02088 for filing with the Clerk of the Supreme Court/Court of Appeals.

This the 11th day of July, 2008.

STEPHANIE L. MALLETTE